STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY D. ROGERS,

Defendant-Appellant.

UNPUBLISHED
October 14, 2003

No. 240838
Wayne Circuit Court
LC No. 01-000793

Before: Fitzgerald, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Defendant was charged with five counts of armed robbery,[1] MCL 750.529; possession of a firearm during the commission of a felony, MCL 750.227b; and felon in possession of a firearm, MCL 750.224f. Following a jury trial, defendant was convicted of felony-firearm, felon in possession of a firearm, and three counts of assault with intent to rob while armed, MCL 750.89. He was sentenced to 225 months' to 60 years' imprisonment for each of the assault with intent to rob while armed convictions, and 3 to 7½ years' imprisonment for the felon in possession conviction, to be served concurrently but consecutive to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court committed two instructional errors. A party waives appellate review of jury instructions to which he accedes at trial. *People v Taylor,* 159 Mich App 468, 488; 406 NW2d 859 (1987). A defendant who waives an instructional issue cannot obtain appellate review. *People v Hall (On Remand),* 256 Mich App 674, 679; ___ NW2d ___ (2003).

> *The Court*: You may be seated. Was there any problem with the charge, gentlemen?
>
> *The Prosecutor*: No, Judge.
>
> *Defense Counsel*: No, your Honor.

[1] During trial, the five charges of armed robbery were amended to five counts of assault with intent to rob while armed, MCL 750.89.

Here, defendant counsel acceded to the jury instructions without comment or objection, despite being specifically asked by the court whether he had any objections to the instructions before the jury began its deliberations: "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996). Accordingly, defendant has waived this issue for appellate review.

Moreover, even if review of these issues were not waived, defendant has not established plain error affecting his substantial rights. *People v Carines*, 750, 763-764; 597 NW2d 130 (1999). Defendant's first claims an instructional error was committed when the trial court instructed the jury that, to convict defendant for felon in possession, the prosecution was required prove beyond a reasonable doubt that less than *five* years had passed since all fines were paid and all imprisonment or terms of probation were completed on the underlying felony. Defendant contends that this instruction was improper because this is the instruction for a "specified felony," while defendant's underlying felony, receiving and concealing stolen property over $100 was not a "specified felony" under MCL 750.224f(6) and required only that less than *three* years have passed since all fines were paid and all imprisonment or terms of probation were completed. See MCL 750.224f(1).

However, defendant was convicted of the underlying felony in 1997, and was sentenced to one year' probation. Given that the felon in possession of a firearm charge arises from incidents occurring on December 24, 2000, it is irrelevant whether three or five years had elapsed since the termination of his probation in 1998. Therefore, defendant has failed to show plain error affecting his substantial rights.

Defendant also claims that trial court also committed error requiring reversal when it failed to sua sponte instruct the jury on the lesser-included offense of attempted armed robbery. However, MCL 768.29, provides that "[t]he failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." Accordingly, defendant has not established a shown plain error affecting substantial rights.

Defendant next argues that the prosecution presented insufficient evidence to prove beyond a reasonable doubt that defendant committed three counts of assault with intent to rob while armed. In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*, at 723. Circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *Carines, supra* at 757.

MCL 750.89, entitled "assault with intent and steal; armed," provides that:

> Any person, being armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a

> dangerous weapon, who shall assault another with intent to rob and steal shall be guilty of a felony, punishable by imprisonment in the state prison for life, or for any term of years.

To obtain a conviction on a charge of assault with intent to rob while armed, the prosecution must prove beyond a reasonable doubt: (1) an assault with force and violence, (2) an intent to rob and steal, and (3) defendant's being armed. *People v Smith,* 152 Mich App 756, 761; 394 NW2d 94, citing *People v Federico,* 146 Mich App 776, 790; 381 NW2d 819 (1985). Defendant here does not challenge his being armed. Moreover, in regard to defendant's assertion that the prosecution presented insufficient evidence that defendant assaulted each victim, this contention is without a factual basis. Each count was supported by testimony from which a rational jury could infer that all five employees were frightened when defendant forced them into the restaurant at gun point and held them in the back room. Accordingly, only the second element will be further addressed.

Defendant argues that insufficient evidence was presented to sustain his three convictions for assault with intent to rob while armed because he only intended to rob the restaurant. We disagree. On December 24, 2000, Derek Leonard, Darnisha Brown, Lakecia Jones, John Wilkerson, and LaToya Reeves, worked the closing shift at the McNichols Road Church's Chicken restaurant. After cleaning up and closing down the restaurant for the night, all five employees left the restaurant together around 12:15 a.m. As they left the restaurant, Leonard, the store manager, began to lock the door to the restaurant as the other employees approached Jones' car, which was parked close to the restaurant. While Leonard was locking the door, defendant ran toward him brandishing a gun and wearing a ski mask. Using the gun to threaten the employees, defendant ordered all of the employees over to the restaurant door and forced Leonard to unlock it. After the door was unlocked, the gunman herded the employees into the restaurant's office. Defendant ordered Leonard to open the safes, threatening to kill him if he did not get the safes open fast. Defendant ordered the other four employees to remain at the back of the office. When Brown, Jones, Wilkerson and Reeves heard the man threatening Leonard, they pulled what money they had out of their pockets and placed it on the counter. Defendant, however, refused their money. Eventually, Leonard succeeded in getting one of the safes open, but defendant fled through the back door as the restaurant's alarm sounded. Defendant was apprehended shortly after exiting the store.[2]

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[2] Brandon Hunt, a Detroit Police officer, was off-duty at 12:15 a.m. on December 25, 2000, and just happened to be driving by the Church's restaurant on McNichols on his way home when he observed defendant force the employees back inside the restaurant at gunpoint. Hunt got out of his car and approached the window, where he watched through the window as the gunman robbed the restaurant. Hunt saw a marked scout car approaching the area and flagged it down using a flashlight. While the uniformed officers called for backup, Hunt continued to watch events through the window, until he saw and heard the perpetrator leave the building through the back door. Hunt then gave chase, following the barking of dogs in the area, and eventually located defendant lying under a parked car in a driveway a few blocks from the restaurant. Defendant then began running again, and Hunt again gave chase, and subsequently caught and subdued defendant a few minutes later, then sat on defendant's back on the ground until backup

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Based on the above facts, defendant maintains that he did not intend to rob all the employees, but only intended to rob the Leonard. However, the prosecutor need not show that the victim actually owned the property taken. Rather, "the prosecutor need only show that the property was taken in the victim's 'presence' and that the victim's right to possess the property was superior to the defendant's right to possess it." *People v Rogers*, 248 Mich App 702, 707; 645 NW2d 294 (2002) citing *People v Jones*, 71 Mich App 270, 272, 246 NW2d 381 (1976). "[I]t is enough that the cash or personalty belongs to someone other than the thief." *Id*., at 712, citing *People v Needham*, 8 Mich App 679; 155 NW2d 267 (1967).

This instant case is analogous to *Rogers*. In *Rogers*, the defendant, after robbing a store, assaulted and attempted to rob three store employees while armed. Two of the employees, however, did not have money to give defendant. *Rogers*, *supra* at 705-706. On appeal from three armed robbery convictions, the defendant argued that he did not take the two employees' personal property. *Id*., at 706. This Court nonetheless concluded that "all three employees had a right to possess the company's cash superior to that of defendant." *Id*., at 713.

Here, the prosecution presented evidence that Leonard was the restaurant's manager and Brown and Jones were both shift managers. It is reasonable to assume that Leonard, Brown and Jones, as mangers, had a right to possess the restaurant's cash superior to that of defendant. Moreover, the remaining employees, Wilkerson and Reeves, though not managers of the restaurant, had a greater right to the subject property that defendant under *Rogers*. *Id*. Accordingly, because there was sufficient evidence presented that defendant attempted to take the restaurant's property, a rational jury may have concluded beyond a reasonable doubt that defendant intended to rob the employees. Therefore, the prosecution presented sufficient evidence to support defendant's three convictions for assault with intent to rob while armed.

Defendant next argues, in his supplemental brief, that the prosecution misrepresented evidence during trial and its closing argument. Because defendant failed to object to the prosecution's conduct, this Court's review is limited to plain error affecting substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

Defendant contends that the prosecution improperly moved to admit into evidence a burgundy "Starter" jacket that defendant was wearing when arrested because the witness that testified that the perpetrator was wearing this jacket during the robbery later admitted on cross-examination that the jacket worn by the robber had different colors than the jacket admitted into evidence. Defendant also argues that the prosecution improperly moved to admit into evidence a brown "skull cap" that defendant was wearing when arrested because Brown and Jones testified that the robber wore a ski-mask. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), but a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory

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could arrive to take defendant into custody.

of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A finding of misconduct may not be based upon a prosecutor's good faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Here, the prosecution's conduct in moving to admit the clothes that defendant was wearing when arrested was proper. The articles of clothing that defendant was wearing when arrested were relevant to his identity as the perpetrator. "Identity is always an essential element of a criminal prosecution." *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Moreover, if the witnesses' testimony in regard to the perpetrator's clothing was inconsistent with the items that the prosecution moved to admit, defendant has not shown how the prosecution's conduct would deny him a fair trial. Indeed, if the prosecution's evidence of defendant's clothing is inconsistent with the witnesses' description of the perpetrator, then defendant's claim that he was not the perpetrator has more merit. Therefore, because the prosecution moved to admit relevant evidence, defendant has not show plain error affecting substantial rights.

Defendant next argues that he was denied the effective assistance of counsel when defense counsel failed to object to the admission of the brown skull cap for reasons previously stated. Because defendant failed to move for an evidentiary hearing or motion for new trial before the trial court, this Court will only consider counsel mistakes to the extent that they are apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show that (1) "counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment," and (2) "the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 599-600, 623 NW2d 884 (2001), citing *Strickland v Washington*, 466 US 668, 687, 684; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant is presumed to have received effective assistance of counsel, and he bears a heavy burden of proving otherwise. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000), citing *People v Plummer*, 229 Mich App 293, 308, 581 NW2d 753 (1998). Conduct of counsel is presumed to be sound trial strategy and will not be reviewed with the benefit of hindsight. *Id*. That a strategy did not work does not render it ineffective assistance of counsel. *Id*.

Defense counsel's decision to allow the prosecutor to introduce the hat into evidence was a matter of trial strategy. In closing argument, defense counsel stated,

> Darnisha Brown as well as Lekecia Jones said she saw a ski-mask with slits for eyes and the mouth sticking out. Now do you see any slits or a mask for eyes sticking out.

Here, defense counsel elected to have the evidence admitted that enabled an argument based on admitted evidence that defendant was not the perpetrator. Conduct of counsel is presumed to be sound trial strategy and will not be reviewed with the benefit of hindsight. *Williams, supra*. Thus, defendant has failed to show ineffective assistance of counsel.

Defendant last argues that he was denied the effective assistance of counsel when defense counsel failed to obtain a police radio tape from the prosecution after the trial court granted defense counsel's motion to obtain the tape. However, defendant has failed to establish prejudice in this regard. The contents of the tape are not contained in the lower court record, and therefore, there is no indication that its contents would be beneficial to defendant's case. Moreover, defendant's supplemental brief does not allege how the police radio tape would be beneficial to his defense. A defendant is presumed to have received effective assistance of counsel. *Williams, supra*. Thus, because defendant has not shown how the police radio tape would have resulted in a more favorable outcome to his case, he has failed to establish ineffective assistance of counsel.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood